STATE OF NEW JERSEY

Board of Public Utilities
Two Gateway Center
Newark, NJ 07102
www.bpu.state.nj.us

TELECOMMUNICATIONS

IN THE MATTER OF THE JOINT PETITION OF VERIZON COMMUNICATIONS INC. AND MCI, INC. FOR APPROVAL OF MERGER	))))	PROVISIONAL ORDER ON MOTION TO COMPEL

BPU DOCKET NO. TM05030189

(SERVICE LIST ATTACHED)

BEFORE COMMISSIONER FREDERICK F. BUTLER:

The New Jersey Board of Public Utilities ("Board"), pursuant to N.J.S.A. 48:2-1 et seq., has been granted general supervision and regulation of and jurisdiction and control over all public utility systems which operate within the State of New Jersey, including telephone companies such as Verizon Communications, Inc. ("Verizon"). Moreover, the Board has specifically been granted the authority to review certain mergers and acquisitions by and of such public utilities, pursuant to N.J.S.A. 48:2-51.1 and N.J.S.A. 48:3-10. Pursuant to said authority, the within matter was initially opened to the Board upon the joint filing of a request by Verizon and MCI, Inc. and its affiliates ("MCI", jointly "petitioners") for Board approval of their proposed merger. In connection with this matter the Board issued a Prehearing Order on June 8, 2005 which set forth a schedule for, *inter alia*, discovery, motions to intervene, and public and evidentiary hearings.

On September 9, 2005, following informal communications with petitioners, the Division of the Ratepayer Advocate ("RPA") filed a motion to compel discovery responses from petitioners. Petitioners filed opposition to the RPA motion on September 14, 2005. The RPA replied on September 15, 2004. The RPA currently seeks documents in response to seven data requests, and also requests that petitioners provide the name of each person responsible for each discovery response.

The RPA maintains that all outstanding data requests at issue herein seek information that is calculated to lead to the discovery of admissible evidence that is likely to be

specific to the merger's impact on New Jersey. The RPA further contends that such information is vital to a complete analysis of the issues in this proceeding. RPA-42 seeks all data, analyses and documents relied on in the preparation of petitioners Joint Petition. RPA-44 seeks similar data regarding petitioners' pre-filed testimony. RPA-46 seeks all documents relied on to analyze the impact of the merger on residential and small business customers, and to explain the benefits associated therewith. RPA-47 seeks market data used by petitioners in support of certain statements contained in the Joint Petition regarding the presence of telecommunications competition in New Jersey. RPA-62 seeks a compilation and ranking of certain data from petitioners. RPA-85 seeks all documents concerning pricing strategies, plans and analyses produced by petitioners since January 1, 2002. Finally, RPA-8 seeks to compel petitioners to identify cost reductions that will occur in connection with the proposed merger and to identify what portion of these reductions will occur in New Jersey.

Petitioners contend that their responses to the RPA's data requests are either fully responsive or not required under relevant discovery rules and law. Specifically, petitioners assert RPA-42 is overly broad and virtually impossible to comply with fully, but that they have responded appropriately by referencing where in petitioners' testimony the information relied on in support of the Joint Petition is discussed. Petitioners allege that the Petition is based on overall industry and business knowledge, and that substantial discovery has already taken place giving the RPA ample opportunity to discern the basis for petitioners' assertions. Petitioners further assert similar arguments with respect to RPA-44 and RPA-46, stating additionally that they have offered to provide copies of documents cited in testimony upon which particular arguments are based upon request, and that the RPA has not made any such request.

With regard to RPA-47, petitioners contend that their answer is fully responsive to the data request, and that no specific documents would be responsive thereto, since the testimony in question was based on the witness's general industry knowledge. Petitioners also address RPA-8 and RPA-62 by stating, in essence, that these requests seek information that does not exist, since the data in question is not kept in the format sought by the RPA. Petitioners state that they should not be required to undertake burdensome, time-consuming special studies simply to respond to these data requests. Petitioners further object to the RPA's request for any and all documents concerning pricing strategies, plans and analyses conducted over the past three and a half years, stating that such a request is "wildly overbroad and unduly burdensome." (Petitioners' Opposition at 5) Petitioners contend that compliance with such a request would entail the production of documents pertaining to subjects that are well beyond the scope of this proceeding. Finally, petitioners state that Verizon has already advised the RPA that it will identify discovery responses that are sponsored by Witnesses Vasington and Taylor.

DISCUSSION

After a careful review of the facts and relevant law in this matter, I am convinced that petitioners' responses to the data requests in question are either appropriately responsive to the RPA's requests or are objectionable and therefore need not be answered.

The purpose of discovery in an administrative proceeding is to facilitate the disposition of cases by streamlining the hearing and enhancing the likelihood of settlement or withdrawal, by giving litigants access to information and facts which tend to support or undermine their position or that of their adversary. N.J.A.C. 1:1-10.1(a). Information is generally discoverable if it is reasonably calculated to lead to the discovery of admissible evidence. N.J.A.C. 1:1-10.1(b). However, the right to such access is not absolute. In considering a motion to compel the production of discovery, the judge shall weigh the specific need for the information, the extent to which the information is within control of the party and matters of expense, privilege, trade secret and oppressiveness. Except where so proceeding would be unduly prejudicial to the seeking party, discovery shall be ordered on terms least burdensome to the party from whom discovery is sought. N.J.A.C. 1:1-10.1(c).

N.J.S.A. 48:2-51.1 provides, in pertinent part: "In considering a request for approval of acquisition of control, the board shall evaluate the impact of the acquisition on competition, on the rates of the ratepayers affected by the acquisition of control, on the employees of the affected public utility or utilities, and on the provision of safe and adequate utility service at just and reasonable rates."

As a threshold matter, it should be noted that, whatever the nature of their discovery obligations, petitioners carry the burden of demonstrating to the Board that their proposed merger should be approved. Should the Board determine at the conclusion of this proceeding that the record contains insufficient data regarding the impact of this merger on competition, employment, ratepayers and services in New Jersey, it will be obliged to withhold its approval. See N.J.S.A. 48:2-51.1. Therefore, irrespective of whether factual or legal grounds exist for compelling petitioners to answer particular discovery requests, petitioners are highly unlikely to benefit from an incomplete record.

Notwithstanding the foregoing, I find that there is no basis in law or fact for compelling petitioners to submit further answers to the data requests at issue. RPA-42 seeks documents that petitioners relied on in support of their Petition, in response to which petitioners cited witness testimony. I agree that the request for the production of any and all documents that have in any way influenced the creation of the Petition is unduly vague, burdensome and essentially impossible to carry out. I also accept that petitioners' response to RPA-42, however insubstantial it may be deemed by the RPA, is that petitioners relied on the testimony of their witness and the documents he cited in his testimony. It would also seem to be self-evident that the sources used to support an initial notice pleading consist of whatever petitioners file as their case-in-chief. Thus, the fact that petitioners' witness testimony was filed after the Joint Petition is of no import and does not render petitioners answer to RPA-42 unresponsive.

Similarly, there is no basis for compelling further responses to RPA-44, RPA-46 and RPA-47. Petitioners assert that all documents relied upon in preparing the assertions contained in testimony are cited therein, and that it would be impossible to cite all documents that may have influenced or contributed to the industry knowledge of expert witnesses. Similarly, petitioners contend that the basis for their conclusions regarding the merger's impact on residential and small business customers and the state of telecommunications competition in New Jersey is set forth in witness testimony. Petitioners also generally state that the significant discovery already conducted in this matter provides ample information to the RPA regarding these subject matter areas.

I agree that petitioners' answers to these three interrogatories were sufficiently responsive for discovery purposes. Specific documents used to support witness testimony were cited by petitioners and copies thereof offered to the RPA. Petitioners do not need to provide the myriad documents that were potentially or actually "relied upon" to formulate the witnesses' general expert knowledge of the telecommunications industry. Such a request would represent an unjustifiable burden, and the RPA has not demonstrated why it needs to delve into this level of inquiry. Nor is it possible for petitioners to respond completely to such requests. That the RPA apparently deems the aforementioned information sources insufficiently weighty to support petitioners' arguments does not render petitioners' answers unresponsive for discovery purposes. This Presiding Commissioner cannot order petitioners to provide different responses simply because the RPA deems their answers insubstantial or unconvincing. Whether the witness testimony and the documents cited therein is substantively sufficient for the Board to accept as convincing need not be answered in the discovery phase of this proceeding.

I also decline to compel petitioners to answer RPA-85, which is overly broad and vague on its face. This request apparently seeks the production of any documents concerning the pricing of any Verizon or MCI service generated over the last three and a half years. This encompasses a potentially enormous and unmanageable pool of documents, and even if petitioners could comply with the request from a practical point of view, it would of necessity cover writings that pertain to some subjects well beyond the purview of this Board. For these reasons petitioners' objections to RPA-85 are meritorious and are sustained.

I likewise decline to order petitioners to undertake special studies or data compilations in order to further answer Requests RPA-62 and RPA-8. Both requests (one dealing with merger savings in New Jersey and the other concerning New Jersey customers ranked by revenue) seek data organized or analyzed in a certain way. In response to both requests, petitioners have represented that, while they may possess the raw data concerned, they have not conducted and do not posses the type of analyses sought by the RPA. While such analyses may (or may not) be helpful to the RPA's case, the fact that they do not currently exist means that the RPA is essentially asking that they be created for discovery. While Verizon may have undertaken such studies for an unrelated proceeding more than three years ago, this does not mean that updated information currently exists in the format sought by the RPA. The purpose of discovery

is to obtain documents in a party's possession, not to mandate the creation of new documents. N.J.A.C. 1:1-10.1(c). Imposing such a burden on any party at this late stage of the proceeding, absent extraordinary circumstances, would cause significant consumption of time and disruption and would not be justified. Moreover, as stated above, petitioners, not the RPA, ultimately bear the risk created by an incomplete record, and the RPA remains free to assert any inference it believes can be reasonably drawn from any petitioner response or lack thereof.

Finally, I find that petitioners have an obligation to designate a person responsible for each discovery response they provide to the RPA. Such a requirement has generally been observed for administrative proceedings of this type, and is fully consistent with past Board practice, with the Court Rules (See N.J. Rule 4:17-4(a)) and prior requests by Verizon itself (See Verizon's Second Set of Interrogatories to CAT Communications International, Inc., I/M/O the Verified Petition of CAT Communications International, Inc. for a Determination Regarding the Application of the Tariff of Verizon New Jersey, Inc. for Blocking of Calls and For Other Relief, OAL Docket No. PUCOT 01822-2004N, March 12, 2004 at 5). This obligation need not and does not extend to naming every individual involved in the compilation of a data response, if a team of individuals undertook this responsibility.

The RPA has not at this time requested that petitioners be compelled to provide any extra witness for cross-examination. However, I take this opportunity to make clear the unlikelihood that such order will be issued at this late date of the proceeding. The RPA has been on notice since at least July 29, 2005 that petitioners have not provided the names of sponsors for all discovery responses. Despite this, the RPA did not file a formal motion to compel petitioners to do so until September 9, 2005, approximately one week before the hearing is due to begin. Even under an expedited briefing schedule, the instant motion could not be fully adjudicated until approximately one business day before the first witness is scheduled to be sworn in. Nor has the RPA made any proffer as to how many of the 180+ discovery responses received from petitioners it would like to explore on cross-examination, if any. Compelling any party to add witnesses at this time would represent an undue burden and would cause significant disruption to a procedural schedule that was set by the Board on June 8, 2005 and affirmed twice in the face of formal challenges by the RPA. For the foregoing reasons, I would not be inclined to grant such a request based on the current positions of the parties.

Accordingly, I **HEREBY ORDER** that upon review of the aforementioned motion by the Division of the Ratepayer Advocate, said motion be **GRANTED** in part and **DENIED** in part in accordance with the terms of this Order.

This provisional ruling is subject to ratification or other alteration by the Board as it deems appropriate during the proceedings in this matter.

DATED: 9-16-05

BY:

FREDERICK F. BUTLER
COMMISSIONER

SERVICE LIST

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Jane Kunka, Policy Advisor
To Commissioner Connie O. Hughes
New Jersey Board of Public Utilities
Two Gateway Center
Newark, NJ 07102
jane.kunka@bpu.state.nj.us

William Agee, Special Counsel to the President
and Assistant Secretary of the Board
Office of the Secretary
New Jersey Board of Public Utilities
Two Gateway Center
Newark, NJ 07102
william.agee@bpu.state.nj.us

Victor Fortkiewicz, Executive Director
New Jersey Board of Public Utilities
Two Gateway Center
Newark, NJ 07102
victor.fortkiewicz@bpu.state.nj.us

John Garvey, Economist
New Jersey Board of Public Utilities
Office of the Economist
Two Gateway Center
Newark, NJ 07102
john.garvey@bpu.state.nj.us

Anthony Centrella, Director
New Jersey Board of Public Utilities
Division of Telecommunications
Two Gateway Center
Newark, NJ 07102
anthony.centrella@bpu.state.nj.us

James Murphy, Competitive Services and Mergers
New Jersey Board of Public Utilities
Division of Telecommunications
Two Gateway Center
Newark, NJ 07102
james.murphy@bpu.state.nj.us

Seema M. Singh, Ratepayer Advocate and Director
Division of the Ratepayer Advocate
31 Clinton Street
PO Box 46005
Newark, NJ 07101
ssingh@rpa.state.nj.us

Christopher White, Deputy Ratepayer Advocate
Division of the Ratepayer Advocate
31 Clinton Street
PO Box 46005
Newark, NJ 07101
cwhite@rpa.state.nj.us

Paul Flanagan, Deputy Ratepayer Advocate
Division of the Ratepayer Advocate
31 Clinton Street
PO Box 46005
Newark, NJ 07101
pflanagan@rpa.state.nj.us

Maria Novas Ruiz, Esq.
Division of the Ratepayer Advocate
31 Clinton Street
PO Box 46005
Newark, NJ 07101
mnovas-ruiz@rpa.state.nj.us

Susan Baldwin, Asst Deputy Ratepayer Advocate
17 Arlington Street
Newburyport, MA 01950
smbaldwin@comcast.net

Elise Goldblat, DAG
Division of Law
124 Halsey Street, 5th fl.
Newark, NJ 07101
elise.goldblat@law.dol.lps.state.nj.us

Jeff Slutzky, DAG
Division of Law
124 Halsey Street, 5th fl.
Newark, NJ 07101
jeff.slutzky@law.dol.lps.state.nj.us

Todd Steadman, DAG
Division of Law
124 Halsey Street, 5th fl.
Newark, NJ 07101
Todd.steadman@law.dol.lps.state.nj.us

Richard A. Chapkis, Vice President & General Counsel
Dawn Czapala
Verizon New Jersey Inc.
540 Broad Street, Floor 20
Newark, NJ 07102
Richard.chapkis@verizon.com

Sherry F. Bellamy, Vice President & Associate General Counsel
Verizon Corporate Services Corp.
1515 North Courthouse Road, Suite 500
Arlington, VA 22201
Sherry.f.bellamy@verizon.com

Robert P. Slevin, Associate General Counsel
Verizon Corporate Services Corp.
1095 Avenue of the Americas, Room 3824
New York, NY 10036
Robert.p.slevin@verizon.com

Marsha A. Ward, National Director-State Regulatory Law & Public Policy
MCI, Inc.
6 Concourse Parkway, Suite 600
Atlanta, GA 30328
Marsha.ward@mci.com

James H. Laskey, Esq.
Norris, McLaughlin & Marcus, P.A.
721 Route 202-206
P.O. Box 1018
Somerville, NJ 08876-1018
Jhlaskey@nmmlaw.com

Michael McRae, Esq.
MCI
22001 Loudoun County Parkway
Ashburn, VA 20147
michael.mcrae@mci.com

Thomas W. Snyder, Esq.
Qwest Services Corporation
1801 California, Suite 1000
Denver, CO 80202
Tom.snyder@qwest.com

Barbara Brohl, Esq.
Qwest Services Corporation
1801 California, Suite 1000
Denver, CO 80202
Barbara.brohl@qwest.com

Yaron Dori, Esq.
Hogan & Hartson L.L.P.
555 13th Street, N.W.
Washington, D.C. 20004
ydori@hhlaw.com

Olivia M. Farrar, Esq.
Hogan & Hartson L.L.P.
555 13th Street, N.W.
Washington, D.C. 20004
omfarrar@hhlaw.com

Martin C. Rothfelder, Esq.
Rothfelder Stern, L.L.C.
625 Central Avenue
Westfield, NJ 07090
mcrothfelder@rothfelderstern.com

Bradford M. Stern, Esq.
Rothfelder Stern, L.L.C.
625 Central Avenue
Westfield, NJ 07090
bmstern@rothfelderstern.com

Mark L. Mucci, Esq.
Saul Ewing LLP
One Riverfront Plaza
Newark, NJ 07102
mmucci@saul.com

Alan M. Shoer, Esq.
Director of Regulatory Affairs & Counsel
Conversent Communications of New Jersey, LLC
24 Albion Road, Suite 230
Lincoln, RI 02865
ashoer@conversent.com

Karly E. Baraga, Esq.
Kelley Drye & Warren, LLP
1200 19th street, N.W., Suite 500
Washington, D.C. 20036
kbaraga@kelleydrye.com

Harry M. Davidow, Esq.
Kelley Drye & Warren, LLP
101 Park Avenue
New York, NY 10178
hdavidow@kelleydrye.com

Andrea P. Edmonds, Esq.
Kelley Drye & Warren, LLP
1200 19th street, N.W., Suite 500
Washington, D.C. 20036
aedmonds@kelleydrye.com

Joseph Boyle, Esq.
Kelley Drye & Warren, LLP
200 Kimball Drive
Parsippany, NJ 07054
jboyle@kelleydrye.com